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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of:	)	
	)	
Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers	)	CC Docket No. 95-185
	)	
Equal Access and Interconnection Obligations Pertaining to Commercial Mobile Radio Service Providers	)	CC Docket No. 94-54

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COMMENTS OF
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COMMENTS OF
CENTURY CELLUNET, INC.

Century Cellunet ("Century") respectfully submits its comments regarding the Commission's Notice of Proposed Rulemaking in the above-captioned proceeding.[1] The *Notice* seeks comment on the appropriate means of compensating local exchange carriers ("LECs") and commercial mobile radio service ("CMRS") providers for terminating interconnected traffic. In these comments, Century generally supports the Commission's bill and keep proposal. However, Century feels that the public interest would be better served if the proposal were expanded to include mutual zero-cost termination for all network elements from the tandem to the end user, and shared cost of entrance facilities.

[1] FCC 95-505 (released Jan. 11, 1996) ("*Notice*").

I. GENERAL COMMENTS AND SUMMARY

Century and its subsidiaries operate numerous cellular systems throughout the United States. As such, Century has negotiated interconnection agreements with several different LECs. Despite the fact that the Commission has determined that cellular providers are co-carriers,[2] and therefore entitled to all of the privileges and rights attaching thereto, in almost every case, Century has found that the LECs have failed to respect its co-carrier status.

Specifically, since the mid-1980's LECs have been required to adhere to a number of Commission guidelines for LEC-cellular interconnection. Under these guidelines, LECs: (1) must engage in good faith negotiation; (2) must provide any form of interconnection reasonably requested by a mobile common carrier; (3) may not assess recurring charges for the use of NXX codes by Type 2-connected carriers; (4) may not reclaim a disproportionate share of needed numbers from a CMRS competitor; (5) must treat cellular carriers like independent telephone companies by compensating them for the reasonable costs incurred in terminating traffic that originates on LEC facilities;[3] and (6) may not assess access charges against co-local

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[2] *See The Need To Promote Competition and Efficient Use of Spectrum For Radio Common Carrier Services*, 59 Rad. Reg.2d 1275 (1986); *The Need To Promote Competition and Efficient Use of Spectrum For Radio Common Carrier Services* (Interconnection Declaratory Ruling), 2 FCC Rcd 2910 (1987), *recon.*, 4 FCC Rcd 2369 (1989) (Interconnection Reconsideration Order).

[3] *Id.*

carriers, such as cellular providers.[4] In Century's experience, LECs honor few, if any of these obligations: the current system, in short, is not working. Therefore, Century applauds the Commission for undertaking a proceeding to assure fair and mutual compensation for LEC-CMRS interconnection.

Century believes that bill and keep represents a marked improvement over the current compensation mechanisms for LEC-cellular interconnection, and accordingly is an excellent interim solution. However, the Commission's bill and keep proposal could be improved by providing for zero-cost termination of traffic by both LECs and cellular carriers, and the shared cost of entrance facilities. Further, any long term compensation mechanism should fairly compensate both LECs and cellular carriers for their network costs.

Such a properly structured bill and keep scheme will obviate much of the need for tariffing or the disclosure of private contracts. In addition, under the interconnection portions of the Telecommunications Act of 1996, Section 332(c) of the Communications Act of 1934, and the inseverability doctrine, the federal government is empowered to preempt state laws and regulations that are inconsistent with bill and keep compensation for LEC-CMRS interconnection. Finally, in order to ensure fair inter-service competition, any bill and keep rules promulgated in this proceeding must apply to both PCS *and* cellular licensees. However, bill and keep should not be applied to LEC-LEC interconnection agreements.

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[4] *MTS and WATS Market Structure*, 97 FCC 2d 834, ¶¶ 145-149 (1984).

II. COMPENSATION FOR INTERCONNECTED TRAFFIC

A. COMPENSATION ARRANGEMENTS

1. EXISTING COMPENSATION ARRANGEMENTS ARE UNFAIR TO CELLULAR CARRIERS

In the *Notice*, the FCC invited commenting parties to provide more detailed information about existing LEC-CMRS interconnection arrangements.[5] Century believes that the current unbalanced arrangements are grossly unfair to cellular carriers. Specifically, under Century's existing agreements, Century pays various LECs to terminate mobile originating traffic, while the same LECs do not pay Century to terminate landline originating calls. Further, in some states, Century *actually pays the LEC* for terminating these landline originating calls. Thus, landline carriers are permitted to charge Century what amounts to "monopoly rents"[6] for the use of their networks, while using Century's network for free.

In addition, the rates LECs currently charge cellular carriers to terminate mobile traffic are so high that cellular carriers will never be able to offer local exchange service on a competitive basis. For example, Century is charged an average rate of $0.025 per minute for local interconnection. At that price, Century's interconnection costs alone would be higher than most users pay for local exchange service.

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[5] *Notice*, ¶ 41.

[6] *Id.*, ¶ 12.

Equally problematic, in many cases, Century has absolutely no leverage with which to negotiate better interconnection terms. As the Commission is well aware, LECs are monopoly service providers that serve as the gatekeepers to the public switched network. Therefore, although it is a violation of the Commission's interconnection policies, LECs have often offered Century rates, terms and conditions for interconnection on a "take it or leave it" basis. The time has come to level the playing field.

2. BILL AND KEEP IS A FAIR INTERIM COMPENSATION SCHEME, BUT IT SHOULD BE EXTENDED BEYOND LOCAL SWITCHING AND CALL TERMINATION COSTS

The FCC tentatively concluded that a "bill and keep" approach (*i.e.*, a zero rate for terminating traffic) should be applied with respect to local switching facilities and connections to end users during an interim period.[7] Century endorses the concept of bill and keep compensation for LEC-cellular interconnection. However, the bill and keep proposal set forth by the Commission ignores the costs of entrance facilities and tandem-switched transport, which would continue to be borne by cellular carriers. Thus, the proposal would continue to burden cellular carriers with unwarranted costs, and would simulaneously encourage LECs to shift charges from local switching and call termination to reimbursable categories.

In order to make the Commission's proposal more equitable and economically efficient, the bill and keep rules ultimately promulgated should include zero-cost

[7] *Id.*, ¶ 25.

termination of traffic by both parties (*i.e.*, each party bears its own transport, switching, and local loop costs), and shared cost of entrance facilities. The advantages of this expanded bill and keep plan, as explained below, should produce a mobile communications marketplace in which consumers are offered more choices at lower prices.

First, bill and keep restrains LECs from using their market power to charge excessive interconnection rates. As previously noted, some LECs have long abused their monopoly power in interconnection negotiations. This potential for abuse was noted by the Commission's statement that "LECs . . . unquestionably still possess substantial market power in the provision of local telecommunications service," which could lead to a LEC "extract[ing] monopoly rents for interconnection."[8] Strengthening the bargaining position of cellular carriers will lower interconnection rates, which will have the salutary effect of lowering the price consumers pay for interconnected services.

Second, expanded bill and keep is administratively simple. As the Commission points out, bill and keep will not require the development of new billing or accounting procedures.[9] Further, bill and keep decreases the need to retain attorneys and consultants to take part in lengthy negotiations with LECs and complex proceedings before state commissions. By avoiding the administrative overhead associated with

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[8] *Id.*, ¶ 12.

[9] *Id.*, ¶ 61.

such proceedings, the price of both wireless and wireline communications will be lowered. Such an outcome is plainly in the public interest.

Third, bill and keep recognizes the co-carrier status of cellular providers. Century is aware that many landline LECs utilize zero-cost compensation for the termination of inter-LEC landline traffic, regardless of whether traffic flows are balanced. If cellular providers are recognized as co-carriers, then they too should be able to negotiate such zero-cost compensation agreements.

Fourth, bill and keep encourages economic efficiency. Under current interconnection arrangements, LECs have an incentive to artificially increase costs imposed on cellular carriers, and face no pressure to terminate calls efficiently. In contrast, bill and keep should impel each carrier to operate that the lowest possible cost, since each bears the economic consequences of its own network design.

Fifth, bill and keep will push traffic flows towards equalization. At present, 59 percent of Century's traffic is mobile-LEC while 21 percent is LEC-mobile.[10] However, the introduction of automatic call delivery is pushing these percentages towards a closer balance, as more landline callers rely on this service to ensure that their calls are delivered. Bill and keep will assist in this balancing process by encouraging cellular carriers to offer calling plans which cater to the increasing demand for landline to mobile calling capacity.

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[10] The other 20 percent is a mix of mobile-mobile, mobile-IXC, and mobile-directory assistance calls.

Finally, bill and keep will lead to more diverse service offerings. By encouraging interconnection to the public switched network on reasonable terms, bill and keep will stimulate more mobile service providers to offer interconnected services. Increased competition will lead to the development of new services as each competitor seeks its own market niche. The availability of reasonably priced interconnected service will also encourage CMRS providers to offer local exchange service, consistent with the Commission's goal of increasing competition in the local exchange market.[11]

3. ANY LONG-TERM PLAN MUST FAIRLY COMPENSATE BOTH LECS AND CELLULAR CARRIERS AND BE TRUE TO A NUMBER OF GENERAL PRINCIPLES

In addition to seeking comment on the interim use of bill and keep compensation, the Commission asked how LEC-CMRS interconnection should be regulated on a long-term basis.[12] Century offers no opinion at this time as to whether the long term plan should be bill and keep or another equitable scheme of mutual compensation. However, any long term plan must be in accord with the following general principles: (1) it must allow for a level negotiating field between LECs and cellular carriers; (2) it must compensate each carrier for the direct cost of its termination facilities; (3) it must recognize the co-carrier status of cellular carriers; (4) it must encourage efficient investment; and (5) it must promote competition.

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[11] *Id.*, ¶ 6.

[12] *Id.*, ¶¶ 76-77.

B. IMPLEMENTATION OF COMPENSATION ARRANGEMENTS

1. NEGOTIATIONS AND TARIFFING

The Commission seeks comment on how the LEC-CMRS interconnection compensation scheme it ultimately promulgates should be implemented. In particular, the Commission is concerned that there "may be an imbalance in negotiating power between incumbent LECs . . . and new CMRS providers."[13] Therefore, the *Notice* contemplates the use of either publicly filed, voluntarily negotiated agreements or tariffs in order to assist CMRS providers in obtaining interconnection on fair terms.[14]

Century joins the Commission in its concern that CMRS providers not be subject to unfair negotiating tactics by the more powerful LECs. In the past, Century has entered into interconnection agreements pursuant to both negotiated tariffs and contracts. While not commenting at this time on whether tariffs or contracts are a more effective means of ensuring fair negotiations, Century notes that its expansive bill and keep proposal will eliminate the need for a large portion of these negotiations. That is, if the FCC mandates zero cost compensation for the use of switching, transport and local loop facilities, the only items left to negotiate are the shared costs of entrance facilities and standard terms and conditions.

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[13] *Id.*, ¶ 90.

[14] *Id.*, ¶¶ 91, 92.

2. JURISDICTIONAL ISSUES

The FCC sought comment on whether it is empowered to preempt state regulation of LEC-CMRS interconnection for both interstate and intrastate services.[15] Under the Telecommunications Act of 1996 ("the 1996 Act"), Section 332(c) of the Communications Act of 1934,[16] as amended, and the inseverability doctrine as described in *Louisiana Public Service Commission v. FCC*,[17] the FCC is empowered to preempt state regulations that are inconsistent with the Commission's bill and keep proposal.

a. THE TELECOMMUNICATIONS ACT OF 1996 PROVIDES FOR FEDERALLY SUPERVISED LEC-CMRS INTERCONNECTION, INCLUDING BILL AND KEEP COMPENSATION.

The newly enacted Telecommunications Act of 1996 provides for federally mandated LEC-CMRS interconnection compensation mechanisms. Such federal power can be found in Sections 251, 252, and 253 of the 1996 Act. Section 251 empowers the FCC to promulgate rules that ensure that local exchange carriers "establish reciprocal compensation arrangements for the transport and termination of telecommunications."[18] In addition, incumbent local exchange carriers must provide interconnection "on rates, terms, and conditions that are just, reasonable and

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[15] *Id.*, ¶¶ 108-110.

[16] 47 U.S.C § 332(c).

[17] 476 U.S. 355, 370 (1986) ("*Louisiana PSC*").

[18] 47 U.S.C. § 251(b)(5).

nondiscriminatory."[19] Further, any state rules relating to interconnection must be "consistent with the requirements" of Section 251 and must "not substantially prevent implementation of the requirements of [Section 251.]"[20]

Section 252 casts light on the "just, reasonable and nondiscriminatory" language of Section 251 by stating that this clause is meant to include "mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier."[21] Such "mutual and reciprocal recovery" explicitly contemplates the existence of "arrangements that waive mutual recovery (such as *bill-and-keep arrangements*)."[22]

Taken together, Sections 251 and 252 empower the Commission to promulgate preemptive rules that ensure co-carriers are fairly compensated for interconnected services. While these sections do not mandate that the Commission utilize bill and keep to ensure equitable mutual compensation, they do explicitly reference bill and keep. Therefore, if the FCC deems bill and keep to be the best proxy for "just, reasonable and nondiscriminatory" compensation for interconnected services, it is empowered to mandate bill and keep.

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[19] 47 U.S.C. § 251(c)(2)(D).

[20] 47 U.S.C. § 251(e).

[21] 47 U.S.C. § 252(d)(2)(A) (emphasis added).

[22] 47 U.S.C. § 252(d)(2)(B)(i) (emphasis added).

Finally, Section 253 of the 1996 Act recognizes the continued vitality of the Commission's preemptive powers under Section 332(c)(3). Section 253 overrules state laws that "prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or interstate service."[23] In prohibiting such state barriers to entry, Congress stated that "[n]othing in this section shall affect the application of section 332(c)(3) to commercial mobile radio service providers."[24] As was described in greater detail below, Section 332(c)(3) represents a broad grant of federal power in the field of CMRS regulation. Therefore, by leaving this section intact, Congress intended that the FCC continue to regulate CMRS -- including regulating the means of compensation for LEC-CMRS interconnection.

b. SECTION 332(C) OF THE COMMUNICATIONS ACT PREEMPTS STATE REGULATION OF LEC-CMRS INTERCONNECTION

The plain language and legislative history of Section 332(c) evince a clear Congressional intent to preempt state regulation of LEC-CMRS interconnection and foster the development of a nationwide network of vigorously competitive CMRS providers. Preliminarily, the plain language of Section 332(c) states that "no State or local government shall have any authority to regulate the *entry of or the rates charged by any commercial mobile radio service* . . . ."[25] This prohibition against rate regulation applies to LEC-CMRS interconnection rates for two reasons. First, the rates

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[23] 47 U.S.C. § 253(a).

[24] 47 U.S.C. § 253(e).

[25] 47 U.S.C. § 332(c)(3)(A) (emphasis added).

charged CMRS providers to terminate LEC traffic are plainly CMRS rates. Second, the rates charged by LECs to terminate CMRS traffic are reflected in the rates CMRS carriers charge their customers. Finally, if LECs charge CMRS providers inordinately high interconnection fees, such fees might rise to the level of prohibited barriers to entry by closing the market to new entrants that cannot afford these fees.

Second, the plain language of Section 332 stresses the importance of Section 201 interconnection between LECs and CMRS providers. Specifically, the Commission is granted jurisdiction to order LEC-CMRS interconnection under Section 201, "upon reasonable request of any person providing commercial mobile service."[26] Further, the legislative history of Section 332(c)(1)(B) states that Congress "considers the right to interconnect an important one which the Commission shall seek to promote, since interconnection serves to enhance competition and advance a seamless national network."[27] Thus, LEC-CMRS interconnection is an area where Congress has granted plenary authority to the FCC.

Finally, the plain language and legislative history of Section 332 empower the FCC to create a competitive, nationwide, federally regulated CMRS marketplace. Section 332 orders the Commission to undertake an annual review of "competitive market conditions with respect to commercial mobile services," and based on that report, to promulgate regulations that will "promote competition among providers of

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[26] 47 U.S.C. § 332(c)(1)(B).

[27] H.R. Rep. No. 111, 103rd Cong., 1st Sess. 261 (1993) ("House Report").

commercial mobile services."[28] Because the Commission has determined that bill and keep compensation will promote competition in the CMRS marketplace,[29] it may promulgate rules ordering such compensation.

Further, the House Report states that the purpose of Section 332 is to "foster the growth and development of mobile services that, by their nature, operate without regard to state lines as an integral part of the national telecommunications infrastructure."[30] In addition, the Conference Report states that the purpose of Section 332 "is to establish a Federal regulatory framework governing the offering of all commercial mobile service."[31] Thus, Congress has shown a clear intent that the FCC, not the states should regulate mobile services.

c. THE INSEVERABILITY DOCTRINE PROVIDES AN ADDITIONAL BASIS FOR FEDERAL JURISDICTION

Finally, as pointed out in the *Notice*,[32] *Louisiana PSC* stands for the proposition that when the federal and state components of a federal regulation are "inseparable," the federal regulation must preempt state law.[33] Because the interstate (*i.e.*, the federal) components of LEC-CMRS interconnection are inseparable from the

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28 47 U.S.C. § 332(c)(1)(C).

29 *Notice*, ¶ 61.

30 House Report at 260.

31 H.R. Rep. No. 213 103rd Cong., 1st Sess. 490 (1993) ("Conference Report").

32 *Notice*, ¶ 111.

33 *Louisiana PSC*, 476 U.S. at 370.

intrastate (*i.e.*, the state) components, federal regulation must prevail. The necessity for federal preemption in this case is illuminated by the three-pronged test described in *Public Service Commission of Maryland v. FCC*,[34] for determining whether a challenged federal regulation is inseverable. Under this test, a regulation is inseverable if:

> (1) the matter to be regulated has both interstate and intrastate aspects; (2) FCC preemption is necessary to protect a valid federal regulatory objective; and (3) state regulation would negate the exercise by the FCC of its own lawful authority because regulation of the interstate aspects of the matter can not be unbundled from regulation of the intrastate aspects.[35]

LEC-CMRS interconnection meets all three prongs of this test.

First, interconnected calls have both interstate and intrastate aspects in that some calls are strictly interstate while others are strictly intrastate. More importantly, given the inherently mobile nature of CMRS callers, often a call begins as an intrastate call and becomes an interstate call, or vice-versa, as the caller crosses and re-crosses state lines.[36] Thus, many calls defy a simple categorization.

Second, federal preemption is necessary to protect the valid federal regulatory objective of promoting a competitive, nationwide CMRS marketplace. As noted above, the Commission is granted plenary authority to promulgate rules which "promote

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[34] 909 F.2d 1510 (D.C. Cir. 1990) ("*PSC of Maryland*").

[35] *Id.* at 1515 (internal quotations and citations omitted).

[36] *See Notice*, ¶ 112.

competition among providers of commercial mobile services."[37] The use of bill and keep is an important means of allowing CMRS providers to negotiate fair compensation agreements with LECs. Given the importance of interconnected services to a CMRS carrier's competitiveness, federal preemption of state rules that are inconsistent with bill and keep is necessary to promoting such competitiveness.

Finally, analogous federal case law teaches that the interstate aspects of LEC-CMRS interconnection cannot be unbundled from the intrastate aspects. In this regard, LEC-CMRS interconnection is similar to the right to interconnect a private microwave system to the public switched network, an interconnection right which was held to be inseparable into federal and state components in *Public Utility Commission of Texas v. FCC*.[38] In addition, LEC-CMRS interconnection is similar to the Centrex marketing rules analyzed in *Illinois Bell Telephone Co. v. FCC*,[39] in which the court held that the federal and state aspects of the rules were inseverable.

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[37] 47 U.S.C. § 332(c)(1)(C).

[38] 886 F.2d 1325, 1334 (D.C. Cir. 1989) ("*Texas PUC*") ("Because of the dual interstate and intrastate use of the private microwave and carrier facilities here at issue . . . acceding to the state action in this case would necessarily negate the federal right of interconnection to the interstate network . . .").

[39] 883 F.2d 104 (D.C. Cir. 1989). *See also People of the State of California v. FCC*, 1996 WL 35901 (9th Cir. 1996).

III. INTERCONNECTION FOR THE ORIGINATION AND TERMINATION OF INTERSTATE INTEREXCHANGE TRAFFIC

In the *Notice*, the Commission tentatively concluded that "CMRS providers should be entitled to recover access charges from IXCs, as the LECs do when interstate interexchange traffic passes from CMRS customers to IXCs (or vice-versa) via LEC networks."[40] Century agrees that CMRS providers should be fairly compensated for the use of their networks by IXCs. However, rather than proposing a specific compensation mechanism at this time, Century will examine the recommendations of other parties and advocate a particular plan in its reply comments.

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[40] *Notice*, ¶ 116.

IV. APPLICATION OF THESE PROPOSALS

The *Notice* inquired whether the Commission's regulations governing compensation for LEC-CMRS interconnection should apply to just PCS, to all broadband CMRS, or to all broadband and narrowband CMRS.[41] For both legal and economic reasons, Century argues that any compensation scheme must apply uniformly to all broadband CMRS providers -- including cellular and PCS. However, there is no reason to apply these rules to LEC-LEC interconnection.

Legally, Section 332's principle of regulatory parity commands that substantially similar services be subject to similar regulation. The Commission has already determined that cellular and broadband PCS are "substantially similar services,"[42] and indeed, share similar disparities in market power when negotiating interconnection agreements with LECs. Therefore, there is no basis for differential treatment.

Economically, the FCC should not unfairly advantage either cellular or PCS by providing it with a more favorable set of interconnection compensation rules. Given that cellular and PCS are direct competitors, any such unilateral advantage would arbitrarily distort competition. Because the Commission has made it clear that it

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[41] *Id.*, ¶ 118.

[42] *CMRS Second Report and Order*, 9 FCC Rcd 1411 (1994).

expects communications providers to compete through the marketplace, not the regulatory process,[43] it should not favor either party through its rulemaking process.

Finally, there is no reason to apply any of the compensation rules promulgated in this proceeding to LEC-LEC or LEC-IXC interconnection agreements. LECs, unlike CMRS providers, do not suffer from a disparity in market power when negotiating with each other. Further, LECs have a long and established history of negotiating mutually satisfactory interconnection agreements. Absent a sound reason for doing so, the Commission should not disturb this process.

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[43] *See Notice*, ¶ 4.

V. OTHER -- CONCLUSION

In an increasingly competitive telecommunications marketplace, interconnected services are a prerequisite to economic survival for cellular carriers. Therefore, Century applauds the Commission for initiating this much needed rulemaking. By mandating some form of bill and keep compensation for both intra- and interstate LEC-CMRS interconnection, the Commission will have taken a great step towards ensuring that LECs do not use their market power to negotiate unfairly one-sided interconnection agreements. The existence of such equitable interconnection agreements will, in turn, provide American consumers with a greater variety of interconnected services at lower prices.

Respectfully submitted,

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